

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAMERON FITTS, ET AL.,

CASE No. 12-13575

Plaintiffs,

v.

SENIOR UNITED STATES DISTRICT JUDGE
ARTHUR J. TARNOW

RICK SNYDER, ET AL.,

MAGISTRATE JUDGE R. STEVEN WHALEN

Defendants.

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**ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATIONS [62] AND DENYING DEFENDANT RENE
VIVES'S MOTION TO DISMISS [41]**

I. Background

Before the Court is the Magistrate Judge's Report and Recommendation [62], filed on January 14, 2012. The Magistrate Judge recommends that the Court deny Defendant Rene Vives's Motion to Dismiss [41]. Plaintiff Cameron Fitts is the only Plaintiff who has made a claim against Defendant Vives. On January 28, 2014, Defendant Vives filed Objections [71] to the Report and Recommendation [62].

For the reasons states below, the Report and Recommendation [62] is adopted and Defendant's Motion to Dismiss [41] is denied.

II. Standard of Review

The Court reviews objections to a Magistrate Judge's Report and Recommendation on a dispositive motion *de novo*. Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. §636(b)(1)(C). Making some objections to a Magistrate Judge's Report and

Recommendation, but failing to raise others, will not preserve all objections a party may have to the Report and Recommendation. *McClanahan v. Commissioner of Soc. Sec.*, 474 F.3d 830, 837 (6th Cir. 2006).

In a motion to dismiss, “the Plaintiff’s well-pleaded factual allegations are taken as true, and reasonable inferences must be drawn in the Plaintiff’s favour.” *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir. 1990). However, a court need not accept as true legal conclusions or draw unwarranted factual inferences. *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998). Further the plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The plaintiff’s factual allegations must do more than demonstrate a “sheer possibility that a defendant has acted unlawfully.” *Id.*

III. Analysis

Defendant Vives argues that Plaintiff Fitts’s claims against Defendant Vives fail because Plaintiff Fitts failed to properly exhaust available administrative remedies, as required by the Prison Litigation Reform Act (PLRA) of 1996. Defendant’s arguments specifically revolve around the response to Plaintiff’s Step III appeal, in which the appeal was rejected as untimely. Specifically, Defendant asserts that Plaintiff’s alleged untimely filing of the Step III appeal constitutes failure to exhaust administrative remedies.

However, as noted by the Magistrate Judge, this rejection was based on the date Plaintiff's Step III appeal was received, rather than on the date Plaintiff sent-out the appeal. Moreover, the Report and Recommendation [62] explains that the applicable Policy Directive requires that the Step III appeal must be sent within ten days of the Step II response. The Magistrate Judge then correctly concludes that the Step III response incorrectly rejects the appeal based upon the date of receipt, again, rather than the date the appeal was sent.

Defendant Vives now objects to the Report and Recommendation [62] arguing that Plaintiff Fitts has failed to provide any evidence that the Step III appeal was sent within the ten day requirement. However, as the Report and Recommendation [62] explains, the burden is on Defendant to plead and support non-exhaustion of administrative remedies as an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Defendant has failed to affirmatively show that Plaintiff Fitts sent the Step III appeal in an untimely fashion.

Therefore, Defendant's Objections [71] are without merit.

IV. Conclusion

For the reasons states above, the Report and Recommendation [62] is adopted and Defendant's Motion to Dismiss [41] is denied.

Therefore,

IT IS HEREBY ORDERED that the Report and Recommendation [62] is
ADOPTED.

IT IS FURTHER ORDERED that Defendant Vives's Motion to Dismiss [41]
is **DENIED.**

SO ORDERED.

s/Arthur J. Tarnow
ARTHUR J. TARNOW
SENIOR UNITED STATES DISTRICT JUDGE

Dated: March 31, 2014

CERTIFICATE OF SERVICE

I hereby certify on March 31, 2014 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants on March 31, 2014: **Cameron Fitts, Michael Davis, Kenneth Wilson.**

s/Michael E. Lang
Case Manager to
District Judge Arthur J. Tarnow
(313) 234-5182